



THE UNIVERSITY *of* EDINBURGH

Edinburgh Research Explorer

The Precautionary Principle in Marine Environmental Law: With Special Reference to High-Risk Vessels, Bénédicte Sage-Fuller

Citation for published version:

Harrison, J 2014, 'The Precautionary Principle in Marine Environmental Law: With Special Reference to High-Risk Vessels, Bénédicte Sage-Fuller', *Environmental Law Review*, vol. 16, no. 1, pp. 84-85.
<https://doi.org/10.1350/enlr.2014.16.1.206>

Digital Object Identifier (DOI):

[10.1350/enlr.2014.16.1.206](https://doi.org/10.1350/enlr.2014.16.1.206)

Link:

[Link to publication record in Edinburgh Research Explorer](#)

Document Version:

Publisher's PDF, also known as Version of record

Published In:

Environmental Law Review

Publisher Rights Statement:

© Harrison, J. (2014). The Precautionary Principle in Marine Environmental Law: With Special Reference to High-Risk Vessels, Bénédicte Sage-Fuller. *Environmental Law Review*, 16(1), 84-85.
[10.1350/enlr.2014.16.1.206](https://doi.org/10.1350/enlr.2014.16.1.206)

General rights

Copyright for the publications made accessible via the Edinburgh Research Explorer is retained by the author(s) and / or other copyright owners and it is a condition of accessing these publications that users recognise and abide by the legal requirements associated with these rights.

Take down policy

The University of Edinburgh has made every reasonable effort to ensure that Edinburgh Research Explorer content complies with UK legislation. If you believe that the public display of this file breaches copyright please contact openaccess@ed.ac.uk providing details, and we will remove access to the work immediately and investigate your claim.



THE PRECAUTIONARY PRINCIPLE IN MARINE ENVIRONMENTAL LAW: WITH SPECIAL REFERENCE TO HIGH-RISK VESSELS

Bénédicte Sage-Fuller

Routledge, London; 2013; i–xv and 301 pp; ISBN 9780415671910, £85

Keywords: precautionary principle, marine environmental law, pollution from ships, law of the sea, coastal state jurisdiction, particularly sensitive sea areas

As noted in the introduction to this book, ‘man now exercises such power over the oceans that activities must be regulated efficiently to ensure the oceans’ environmental protection’ (p. 2). Many scientific studies show that pollution of the marine environment has continued to worsen over the course of the twentieth century and many marine ecosystems are close to tipping point. Without urgent action, the world’s oceans face irreparable harm. Whilst pollution from ships contributes only a relatively minor amount of pollution to the oceans compared to other sources, it is undeniable that the results can be catastrophic when major shipping accidents do occur.

The basic argument in this book is that states, particularly coastal states, should be able to act sooner to prevent shipping accidents that pose a threat of major environmental damage. In particular, the book focuses on high-risk vessels (HRV), which are defined as ‘vessels that may cause a threat to their crew, their cargo, the environment, the interests of coastal States through any combination of circumstances, such as structural or mechanical faults to the ship, nature of the cargo, inadequate crewing, severe weather conditions, proximity to navigational hazard regions and regions of environmental sensitivity, density of the surrounding maritime traffic’ (p. 11). The author clearly does not consider that current arrangements for port state control of HRV go far enough to address the problem of sub-standard shipping. Therefore, there is a need to develop the legal framework to allow a precautionary approach to be taken by coastal states against ships navigating through their coastal waters. In making this argument,

the author points to the availability of many technological innovations which would allow a coastal state to monitor and control coastal traffic in a way that was simply not possible in the past.

Chapter 2 sets out the jurisdictional framework for the prevention, reduction and control of pollution from ships found in the 1982 United Nations Convention on the Law of the Sea (UNCLOS). It addresses both the powers of coastal states in relation to the territorial sea (up to 12 nautical miles from the coast) and the exclusive economic zone (up to 200 nautical miles from the coast). The book explains some of the ambiguities and controversies surrounding the relevant legal provisions and it advocates a bold and progressive interpretation of those provisions. Indeed, the interpretation taken in the book might appear to be too bold at times (for example, the argument that the law has evolved to allow coastal states to disallow the passage of HRV through the territorial sea). It relies upon examples where states have restricted the passage of ships carrying nuclear cargo, concluding that ‘while UNCLOS does not explicitly authorise coastal States to take such steps to restrict innocent passage, it is arguable that elements of the precautionary principle can provide such legal justification, if used to interpret Article 19 of UNCLOS, and the international customary right of innocent passage’ (p. 51). However, the author does not consider in any detail the impact of Article 23 of UNCLOS, which expressly provides that ‘foreign nuclear-powered ships and ships carrying nuclear or other inherently dangerous or noxious substances shall, *when exercising the right of innocent passage through the territorial sea*, carry documents and observe special precautionary measures established for such ships by international agreements’ (emphasis added). One would have liked to have seen a more detailed and balanced consideration of the various interpretative arguments, which would have clarified precisely when an HRV is in innocent passage and when, if at all, it can be considered to be in non-innocent passage.

The precautionary principle is invoked throughout the book to advocate an evolutionary interpretation of the jurisdictional framework in UNCLOS. Chapter 3 addresses the nature and status of the precautionary approach and explains the historical evolution of the concept, as well as giving numerous examples of its use in the context of instruments adopted for the purpose of marine environmental protection.

The narrative in this section will be familiar to many international lawyers with an interest in this subject. More detailed examples of practical applications of the precautionary principle in marine environmental law are given in Chapter 4, including in the context of fisheries management, biodiversity conservation and the prevention of land-based sources of marine pollution. The examples used in the book seek to demonstrate that the precautionary principle can have an influence on state decision making, leading to high levels of environmental protection. The author acknowledges that the status of the precautionary principle is controversial and she suggests a cautious approach towards classifying it as a general rule of international law because of its lack of normative content.

The key argument advanced by the author is that the precautionary principle can only gain normative traction at the sectoral level. On the basis of the examples presented in Chapter 5, she argues that the precautionary principle has achieved 'the necessary normative content to be considered a rule of customary international law in the shipping sector' (p. 264). Chapter 5 evaluates the extent to which the precautionary approach could be used to adopt precautionary measures in relation to HRV. This chapter reflects upon the way in which the precautionary principle has influenced the work of the International Maritime Organization (IMO), taking examples from the adoption of Particularly Sensitive Sea Areas or specific navigational measures. The book provides a wealth of examples of the types of navigational measure that have been taken under the auspices of the IMO in order to protect fragile and threatened marine ecosystems. However, it is not always clear in what way these examples can be understood as an application of the precautionary principle, at least insofar as it has traditionally been set out in Principle 15 of the Rio Declaration. In many of the examples, coastal states have been required to carry out a prior risk assessment of threats to the marine environment and present the scientific evidence to the IMO for measures to be approved. Thus, it is not clear that there is a lack of scientific evidence that would require the invocation of the precautionary approach. Rather, the examples would appear to be applications of the more traditional preventative principle, whereby states are under a duty to take measures to prevent or reduce harm to the marine environment when there is evidence of a risk. Indeed, the analysis leaves one wondering what is the normative content of the precautionary principle in the shipping sector if it is

considered to be a rule of customary international law.

Overall, the book provides a useful repository of examples of the way in which measures have been taken, unilaterally and multilaterally, to protect the marine environment from ship-source pollution. There is some merit in the author's argument that the precautionary principle could influence the interpretation of the jurisdictional framework for pollution from ships and indeed she would appear to be correct to conclude that 'through a less formal approach than the amendment of UNCLOS, the precautionary principle may be capable of introducing flexibility in the UNCLOS system and of allowing the optimal use of new technologies by coastal States to detect HRV, monitor them and, where deemed necessary, take intervention measures towards them' (p. 61). However, there is scope for further analysis of the precise impacts of the precautionary principle in this context and the consequences of classifying it as a sectoral rule of customary international law.

Dr James Harrison
University of Edinburgh School of Law